Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ILLINOIS STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

DENNIS J. HASTERT, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois
Counsel of Record

DEBORAH L. AHLSTRAND
Assistant Attorney General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

Attorneys for Petitioners

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App. 1

[Dated June 1, 1994]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-1397, 92-1398, 92-1399, 92-1402 and 92-1403

DENNIS J. HASTERT, HARRIS FAWELL, JOHN E. PORTER, PHILIP M. CRANE, HENRY J. HYDE, ROBERT H. MICHEL, and THOMAS W. EWING,

Plaintiffs-Appellants,

and

JOHNNY SCOTT and BEN HOWARD,

Plaintiffs-Intervenors-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTION COMMISSIONERS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA T. REDNOUR,

Defendants-Appellees.

DENNIS J. HASTERT, HARRIS FAWELL, JOHN E. PORTER, PHILIP M. CRANE, HENRY J. HYDE, ROBERT H. MICHEL, and THOMAS W. EWING,

Plaintiffs-Appellants,

v.

(Caption continued on following page)

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, WANDA T. REDNOUR and HANNELORE HUISMAN,

Defendants-Appellees.

WILFREDO NIEVES, AL JOHNSON, LINDA CORONADO, BOBBY RUSH, JESUS GARCIA, REV. WILLIE BARROW, RAFAEL BORIA, MIGUEL DEL VALLE, ROBERT L. LUCAS, LEON D. FINNEY, JR., REV. CLAY EVANS, JOSEPH GARDNER, LUIS V. GUTIERREZ, REGNER SUAREZ, JOSEPH BERRIOS, MIGUEL A. SANTIAGO, and NEOMI HERNANDEZ,

Plaintiffs-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTION COMMISSIONERS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA T. REDNOUR,

Defendants-Appellees.

THE CHICAGO URBAN LEAGUE, CRAIG R. COLLINS, MARK ALLEN, and NIKOLAS C. THEODORE,

Plaintiffs-Appellants,

v.

(Caption continued on following page)

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA T. REDNOUR,

Defendants-Appellees.

ANN ROSEBROOK, DARYL BARKLOW, AMIEL CUETO, RICHARD MARK, JEANELLE NORMAN, CAROLYN TONEY, LEE BABCOCK, RAYMOND OLIVER, BARBARA POSHARD, WILLIAM MATTHEWS, GERALD HAWKINS, and EVA SAVALA,

Plaintiffs-Appellants,

v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA T. REDNOUR,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 91-C-4028, 91-C-4154, 91-C-4643, 91-C-4656 and 91-C-5472
Michael S. Kanne, *Circuit Judge*, **Charles R. Norgle, Sr.** and **Suzanne B. Conlon**, *District Judges.*

ARGUED JANUARY 7, 1993—DECIDED DECEMBER 17, 1993
REHEARING GRANTED and OPINION AMENDED JUNE 1, 1994*

Before CUDAHY, COFFEY and ROVNER, *Circuit Judges.*

CUDAHY, *Circuit Judge.* We are asked here to review a decision of a three-judge district court denying attorneys' fees to certain parties involved in litigation regarding congressional redistricting in Illinois following the 1990 census. We initially decided that we had jurisdiction over the appeals brought by the Hastert, Nieves, Urban League and Scott plaintiffs, but jurisdiction over the Rosebrook appeal only to the extent that they appealed the district court's denial of their Rule 60(b) motion to reconsider its judgment. *Hastert v. State Board of Election*, Nos. 92-1397, 92-1398, 92-1399, 92-1402 & 92-1403 slip op. at 11-12 (7th Cir. Dec. 17, 1993). We then affirmed the district court's determination that the Hastert and Nieves plaintiffs were prevailing parties, *id.* at 14, and that the Urban League plaintiffs were not, *id.* at 15-17. But we reversed the district court's determination that the Scott plaintiffs were not prevailing parties. *Id.* at 14-15. Finally, we reversed the decision that there existed "special circum-

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* On consideration of the petition for rehearing with suggestion for rehearing en banc filed by the defendants-appellees, a vote of the active members of the court was requested, and a majority of the judges in active service have voted to deny rehearing en banc. Chief Judge Posner, Judge Coffey and Judge Manion voted to grant rehearing en banc. Judge Flaum and Judge Kanne did not participate in the consideration of the suggestion for rehearing en banc.

On consideration of the petitions for rehearing with suggestion for rehearing en banc filed by the plaintiffs-appellants, the panel has voted to grant in part the petitions for rehearing, and herein issues its amended opinion. No judge in active service has requested a vote on the suggestion for rehearing en banc. Judge Flaum and Judge Kanne did not participate in the consideration of the suggestion for rehearing en banc.

stances" precluding an awarding of fees to the prevailing parties. *Id.* at 17-19. The Rosebrook plaintiffs, the State Board of Election and the Urban League have since filed petitions for rehearing. We today grant in part the petition filed by the Rosebrook plaintiffs and grant the petition of the Urban League plaintiffs. As a consequence, we issue this amended opinion.

I.

We are presented initially with some rather puzzling jurisdictional questions. To resolve them, we must recount the procedural history of this litigation in regrettably copious detail.

Because Illinois' population grew during the 1980s at a rate slower than that of the United States as a whole, the number of congressional seats apportioned to Illinois was reduced from 22 to 20. The task thus fell to the Illinois legislature to implement a constitutionally acceptable congressional redistricting plan, taking into account the fewer districts allocated to the state.[1] This is not an easy task under any circumstances, but it may be virtually impossible when the governor is of a different political party than a majority of the members of both houses of the legislature.[2] Such was the situation in Illinois in 1991. And, quite predictably, the Illinois General Assembly failed to enact a redistricting plan by the constitutionally mandated June 30, 1991 deadline. Indeed, the legislature failed even to bring a redistricting plan to the floor for debate.

Anticipating this legislative deadlock, the Republican Party members of the Illinois congressional delegation (the "Hastert" plaintiffs or group) filed the initial action in this

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[1] Article 4, § 3(b) of the Illinois Constitution states, "In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative and Representative Districts."

[2] Redistricting plans are within the veto power of an Illinois governor. *See Williams v. Kerner*, 30 Ill.2d 11, 195 N.E.2d 680 (1964).

matter on June 27, 1991. The Hastert plaintiffs sought a declaration that the present Illinois congressional districts were unconstitutional because of changes reflected in the 1990 census. They also sought to enjoin the Illinois State Board of Elections from conducting the 1992 congressional elections under the congressional district plan then in effect, and submitted their own redistricting proposal to replace the outdated map. The Chief Judge of this court convened a three-judge district court to hear the case, as 28 U.S.C. § 2284(a) requires.

On July 3, 1991, a group of Hispanic and African-American voters (the "Nieves" plaintiffs or group) filed a similar action. Actually, the "Nieves" plaintiffs frequently participated as two separate sub-groups—an Hispanic sub-group and an African-American sub-group. These sub-groups were often represented by different lawyers. In addition to the relief requested by the Hastert group, the Nieves plaintiffs (both sub-groups) sought the creation of a congressional district containing a majority of Hispanic voters which, they maintained, section two of the Voting Rights Act, 42 U.S.C. § 1973, required. The Nieves and Hastert actions were later consolidated.

On July 24, 1991, a group of voters ostensibly acting on behalf of certain members of the Illinois congressional delegation affiliated with the Democratic Party (the "Rosebrook" plaintiffs or group) filed still another similar action, which was subsequently consolidated with the Hastert and Nieves cases. On the same day, U.S. Representative Cardiss Collins and U.S. Representative Charles Hayes, along with several voters from their respective African-American majority districts (the "Collins" plaintiffs or group), filed a fourth action that was also consolidated with the Hastert and Nieves cases. Finally, the Chicago Urban League, representing the interests of voters in the existing African-American majority congressional districts (the "Chicago

Urban League" plaintiffs or group), filed its own suit on August 29, 1991. This too was consolidated with the others.[3]

The district court issued its decision on the merits on November 6, 1991, enjoining the Board from using the existing congressional district plan and ordering it to put into effect the plan proposed by the Hastert plaintiffs. *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). In the final sentence of its opinion, the district court ordered that "all parties to these consolidated cases bear their own costs." 777 F. Supp. at 662. On November 14, 1991, the Hastert, Nieves, Chicago Urban League and Scott groups moved the district court to alter or amend its judgment to award them costs as prevailing parties. They also filed a petition for an award of their respective attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. On November 21, 1991, the Collins plaintiffs moved the court for leave to file a petition for attorneys' fees. Also on November 21, the Rosebrook plaintiffs filed a Rule 59(e) motion to alter or amend the judgment.[4] While this motion was still pending, the Rosebrook plaintiffs filed, on December 24, 1991, a motion for leave to file a petition for attorneys' fees and expenses.

The district court denied the Rosebrook plaintiffs' Rule 59(e) motion on December 27, 1991, and on January 7, 1992, the court denied as untimely their motion for leave to file a petition for fees. On January 13 the Rosebrook

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[3] Several individuals and organizations were permitted to intervene in the consolidated action, including Johnny Scott and Ben Howard (the "Scott" plaintiffs or group), acting individually and as representatives of local chapters of the National Association for the Advancement of Colored People.

[4] The Rosebrook plaintiffs asked the court to amend its judgment to state that the Hispanic majority district proposed by the Hastert plaintiffs, and later adopted by the court, was substantially similar to the Hispanic majority district proposed by the Rosebrook plaintiffs. The apparent purpose of this motion was to buttress the Rosebrook plaintiffs' claim that they were prevailing parties and thus entitled to attorneys' fees.

group moved the court to reconsider its denial of their fee motion. On January 17, 1992, the district court issued a memorandum opinion denying the Hastert, Nieves, Collins, Chicago Urban League and Scott groups' motions for costs and attorneys' fees. *Hastert v. State Board of Elections*, 794 F. Supp. 255 (N.D. Ill. 1992). In the same opinion, the court ordered that the cost of publishing notices of the action in newspapers throughout the state be divided equally among the Hastert, Nieves, Rosebrook and Collins groups. 794 F. Supp. at 261. Four days later, on January 21, the court denied as moot the Rosebrook plaintiffs' January 13 motion for reconsideration.

On January 28, the Nieves plaintiffs moved the district court to reconsider its January 17 decision denying attorneys' fees. The Hastert plaintiffs filed an identical motion on January 29. On January 31, the Collins plaintiffs moved the court to reconsider its denial of attorneys' fees and its allocation of the costs of publishing notice. The district court has never ruled on these motions. Several plaintiff groups next sought to vest jurisdiction in this court. The Scott plaintiffs on February 13, the Hastert and Nieves plaintiffs on February 14, and the Chicago Urban League group on February 18, filed notices of appeal with respect to the district court's January 17 decision denying attorneys' fees. Also on February 18, the Rosebrook plaintiffs filed a notice of appeal with respect to the district court's November 6, 1991 judgment; the December 27 order denying their motion to alter or amend that judgment; the January 7, 1992 order denying their motion for leave to file a petition for fees; the January 17 opinion and the January 21 order denying their motion to reconsider. The Collins plaintiffs had not filed a notice of appeal by the time these cases were set for argument on appeal.[5]

[5] On February 27, 1992, the Collins plaintiffs moved the district court to rule on its motion for reconsideration of the denial of fees. The court has yet to dispose of this motion.

We have jurisdiction here, if at all, pursuant to 28 U.S.C. § 1291, which vests in the courts of appeals jurisdiction over "all final decisions of the district courts of the United States." As an initial matter, we note that we do not have jurisdiction over the merits of this case because such appeals must be made directly to the United States Supreme Court. *See* 28 U.S.C. § 1253 ("[A]ny party may appeal to the Supreme Court from an order [pertaining to an] injunction in any . . . action . . . required . . . to be heard and determined by a district court of three judges") and 28 U.S.C. § 1291 (courts of appeals have jurisdiction of appeals from final decisions of the district courts "except where direct review may be had in the Supreme Court").[6] Appeal from the district court's denial of attorneys' fees, however, is properly made to this court. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n.16 (1980) (Supreme Court does not have jurisdiction under § 1253 if only attorneys' fees questions are appealed). It thus follows that awards of attorneys' fees are appealable independent of the merits and constitute separate judgments for purposes of § 1291. *People Who Care v. Rockford Board of Education District No. 205*, 921 F.2d 132, 134, 135 (7th Cir. 1991). But such fee awards, or in this case denials, must be final in order to trigger our § 1291 jurisdiction.

The district court's November 6 opinion was unquestionably a final decision on the merits. But there is a considerable question whether it said anything, final or otherwise, about attorneys' fees. The only pronouncement of the district court in its November 6 opinion that might be construed to reach the attorneys' fees issue is its final sentence: "[P]arties to these consolidated cases shall bear their own *costs*." 777 F. Supp. at 662. Sections 1973*l*(e) and 1988 provide that "prevailing parties" in actions to

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[6] Accordingly, the Rosebrook plaintiffs' notice of appeal is ineffective to the extent it seeks review of the merits of the district court's redistricting decision.

enforce constitutional voting guarantees and certain provisions of the civil rights laws are entitled to "a reasonable attorney's fee as part of the *costs*." Thus, there is no logical impediment to concluding that the district court's November 6 decision resolved, albeit *sub silentio*, the parties' entitlement to attorneys' fees. However, we are not entirely convinced that this is a correct view, and we are quite certain that the language of the district court, if intended to deal with attorneys' *fees* (in addition to routine court *costs*), was ill-chosen. Indeed, it would not be irrational to conclude that the district court's order had nothing to do with attorneys' fees.

Federal Rule of Civil Procedure 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The Supreme Court has instructed that 28 U.S.C. § 1920 defines the term "costs" as it is used in Rule 54(d). *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). Section 1920 authorizes the taxation of certain rather routine litigation expenses, including clerk, marshal and court reporter fees, "as costs." Although Rule 54(d) creates a presumption that the prevailing party will recover these costs, the decision to make the award of costs is entrusted to the sound discretion of the district court. *Soler v. Waite*, 989 F.2d 251, 254-55 (7th Cir. 1993). As a result, district courts routinely direct that prevailing parties are not entitled to Rule 54(d) costs through concise orders, frequently no longer than a single sentence. *See, e.g., Tolle v. Carroll Touch, Inc.*, 813 F. Supp. 1368 (C.D. Ill. 1993); *Harlan E. Moore Charitable Trust v. United States*, 812 F. Supp. 130 (C.D. Ill. 1993); *Nalco Chemical Co. v. Hydro Technologies, Inc.*, 809 F. Supp. 672 (E.D. Wis. 1992); *Ridgefield Park Transportation v. Uhl*, 803 F. Supp. 1467 (S.D. Ill. 1992). The district court's November 6 "tag line" that the parties to this litigation were to "bear their own costs" is arguably an adequate exercise of its discretion to deny Rule 54(d)

costs, as that term is defined by 28 U.S.C. § 1920.[7] But attorneys' fees would seem to be "costs" of a different sort.

Before the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), many federal courts believed that they had the power in certain cases, contrary to the so-called "American" rule that parties are to bear their own costs of legal representation, to award attorneys' fees to prevailing parties as a component of Rule 54(d) costs. In *Alyeska*, however, the Court disapproved this practice and held that federal courts may order the losing party to pay the winner's attorneys' fees only if Congress has authorized such fee awards by statute. *Id.* at 263-64. There is no dispute that sections 1973*l*(e) and 1988 are statutes of this type nor, as a result, is there any question that the district court had the power to decide which parties to the present litigation, if any, were entitled to attorneys' fees. There is legitimate room for doubt, however, that the district court exercised this power on November 6.

It is true that even after *Alyeska* we continued to treat requests for attorneys' fees under section 1988 as motions for costs governed by Rule 54(d). *See Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 659 (7th Cir. 1981) and *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980), *cert. denied sub nom. Blinzinger v. Bond*, 454 U.S. 1063 (1981). But this is the only similarity section 1988 attorneys' fees have to Rule 54(d) costs. While district courts have broad discretion to award or deny Rule 54(d) costs, their "discretion to deny a fee award [under section 1988] to a prevailing party is narrow." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). Indeed, we have held that prevailing civil rights plaintiffs are entitled to their attorneys' fees "as a matter of course." *Entertainment Con-*

[7] Hereafter, when we use the phrases "Rule 54(d) costs" or "routine Rule 54(d) costs" we will be referring to the set of costs described by 28 U.S.C. § 1920.

cepts, Inc. III v. Maciejewski, 631 F.2d 497, 506 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). *See also Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979). Although a district court may be able to dispose of routine Rule 54(d) costs with a single, off-hand line at the end of a lengthy decision on the merits, a denial of section 1988 attorneys' fees would seem to require more deliberation and an explicit disposition.

Admittedly, we cannot know with any degree of certainty whether the district court here considered the attorneys' fee issue before issuing its November 6 opinion. We note, however, that the district court's January 17 decision on this issue occupies five pages in the Federal Supplement. There is something troubling about disposing of a matter with a single line (and with no explicit reference to fees) that later requires resolution by a thorough written opinion. Moreover, we have found nothing in the record to suggest that the parties put the fees issue properly before the district court until they filed their petitions for fees at various times *after* November 6. Nevertheless, the district court stated its view that it had indeed addressed the question of attorneys' fees in its November 6 opinion. 794 F. Supp. at 258. The district court is in the best position to interpret its own orders, and we will not disturb such an interpretation absent a clear abuse of discretion. *In the Matter of Chicago, Rock Island & Pacific R.R.*, 865 F.2d 807, 810 (7th Cir. 1988). Therefore, although the form of the November 6 opinion creates puzzling ambiguities and procedural difficulties and may be misleading to litigants, the district court's interpretation of this opinion is not a clear abuse of discretion.

Characterizing the November 6 opinion as a final decision both on the merits and as an award of attorneys' fees has important jurisdictional consequences. Specifically, if the parties wished to challenge such a denial of attorneys' fees they had only two choices. They could appeal the decision within thirty days, Fed. R. App. P. 4(a)(1), or they could toll the time for appeal by filing a Rule 59(e)

motion to alter or amend judgment within ten days, exclusive of weekends and holidays. None of the parties in the first instance chose to appeal the November 6 order insofar as it pertained to attorneys' fees. The Hastert, Nieves, Chicago Urban League and Scott groups, however, did file a timely Rule 59(e) motion on November 14.[8] The district court denied this motion on January 17. The thirty day period for filing an appeal therefore ran from January 17, and expired (computing time as Fed. R. App. P. 26(a) requires) on February 18. The Hastert, Nieves, Scott and Chicago Urban League notices of appeal were therefore all timely filed.[9] We thus have jurisdiction over their appeals.

But unlike the other plaintiffs, the Rosebrook plaintiffs did not themselves appeal the November 6 order within 30 days or file an appeal-delaying Rule 59(e) motion within ten days. But their notice of appeal was nonetheless time-

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[8] Actually, these groups filed a motion to alter or amend judgment *and* a petition for attorneys' fees pursuant to section 1988. Ordinarily, such a petition for attorneys' fees would not be a proper Rule 59(e) motion. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982). But because we have adopted the district court's view that it considered and denied attorneys' fees in its November 6 opinion, the later petition for such fees must be construed as a Rule 59(e) motion. Under our cases, all substantive motions served within ten days of the entry of judgment are treated as filed under Rule 59(e). *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). The petition for attorneys' fees was filed within ten days of the November 6 entry of judgment and it was substantive in the sense that it asked the district court to reverse its earlier denial of fees.

[9] In addition to appealing to this court, the Hastert and Nieves plaintiffs also moved the district court to reconsider its January 17 decision. Since the district court has not resolved these motions, one might think that their appeals are premature. But successive requests to alter or amend judgment, which are all these motions amount to, do not toll the time for appeal, *United States Equal Employment Opportunity Comm'n. v. Gurnee Inns, Inc.*, 956 F.2d 146, 148 (7th Cir. 1992), nor do they affect the finality of the judgment. *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986).

ly filed since Fed. R. App. P. 4(a)(4) says that if a "timely motion under the Federal Rules of Civil Procedure is filed in the district court *by any party* . . . under Rule 59 to alter or amend the judgment . . . , the time for appeal *for all parties* shall run from the entry of the order denying . . . such motion" (emphasis added). The effect of Rule 4(a)(4) is to allow a party who neither moves the district court to amend its judgment nor appeals in a timely fashion to bootstrap onto another party's timely filed notice of appeal. Because the Rosebrook plaintiffs filed their notice of appeal on February 18, we have jurisdiction over their appeal from the November 6 order. And this is true despite the fact the Rosebrook plaintiffs' *own* Rule 59(e) motion to amend the judgment—filed after the ten day period for such motions had run—was properly denied as untimely.

II.

Thus having ascertained our jurisdiction, we now turn to the merits. Under 42 U.S.C. § 1973*l*(e), a court "in its discretion, may allow the prevailing party a reasonable attorney's fee" in an action, such as this one, "to enforce the voting guarantees of the fourteenth or fifteenth amendments." Pursuant to 42 U.S.C. § 1988, a court may make a similar award of fees to a "prevailing party" in a suit to enforce the provisions of 42 U.S.C. § 1983.[10] Although the statutes commit fee awards to the district court's discretion, Congress has nevertheless made clear that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. 925, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 807 (addressing § 1973*l*(e)); S. Rep. 1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (addressing § 1988). In any event,

[10] Because §§ 1973*l*(e) and 1988 contain nearly identical language and are driven by similar congressional purposes, we construe them similarly. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

our analysis begins by determining which parties, if any, prevailed.

This is not ordinary litigation. Most notably, the underlying controversy in this case, i.e., the fight over the configuration of Illinois' new congressional districts, was not between the plaintiffs and the defendant. The State Board of Elections is truly a nominal defendant, completely disinterested in the outcome of that fight. The real dispute was among the various plaintiffs. Each had a plan to offer and the winner, at least from a lay person's perspective, is the litigant whose plan and objectives (usually incorporated in its map) the district court adopted. Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of "prevailing party."

A party prevails, within the meaning of the fee-shifting statutes, "if [it] succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). We agree with the district court, that "the principal issue in litigation during these proceedings involved the determination of which proposed [congressional districting] plan for the entire State of Illinois best met constitutional and statutory criteria." 794 F. Supp. at 259. On this score, the Hastert group is the clear winner, as the district court ultimately adopted its plan.

We also agree with the district court's conclusion that the Nieves plaintiffs prevailed. The Nieves plaintiffs brought suit on behalf of African-American and Hispanic voters, and sought the adoption of a map that created Illinois' first ever Hispanic majority congressional district. This was achieved without diluting the strength of the three existing African-American majority districts that were established in the 1981 redistricting. The Nieves group was thus, as we have noted, made up of two sub-groups, described throughout the litigation as the "African-American Nieves" and "Hispanic Nieves" plaintiffs. These two groups were at times represented separately before the district

court and sometimes took differing positions. But the two sub-groups acted in concert in petitioning for attorneys' fees, and the district court did not distinguish between them in declaring that "the Nieves group" prevailed. In support of its conclusion, the district court cited the fact that the Nieves plaintiffs played an instrumental role in the creation of the Hispanic super-majority district, as well as the fact that they "formally adopted" the prevailing Hastert map. 794 F. Supp. at 260. We agree with the district court's conclusion that the Nieves group should be considered a "prevailing party" in this litigation, primarily because its fundamental objective, the creation of an Hispanic district, was achieved by the litigation.

The district court also concluded that the Scott and Chicago Urban League plaintiffs did not prevail. *Id.* at 259-60. Of course, we owe these decisions substantial deference. *Shepard v. Sullivan*, 898 F.2d 1267, 1271 (7th Cir. 1990). In fact, the district court's determination must stand if *any* reasonable person could agree with it. *See Washington v. Sherwin Real Estate Inc.*, 694 F.2d 1081, 1087 (7th Cir. 1982).[11] But when a district court overlooks, either intentionally or inadvertently, relevant, binding precedent, its decision cannot stand. In defining "prevailing party," the district court relied exclusively upon *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Although *Hensley* is a central case interpreting the fee-shifting statutes, the Supreme Court has provided additional guidance. In particular, the Court in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 790 (1989), rejected the so-called "central issue" test that several lower courts had adopted following *Hensley*. Under that test, a party was deemed to have prevailed only if he "prevailed on

[11] Apart from its own possible inadequacies, this panel has had difficulty reaching final conclusions on some of the issues presented because (1) the district court offered few reasons for its results and (2) the parties did not initially spell out their arguments in the detail which they furnished at the rehearing stage. We have had to spend many hours searching for clues in the record.

the central issue by acquiring the primary relief sought." *Id.* at 787 (citation omitted). In rejecting this formulation, the Court concluded that the degree of a plaintiff's success in relation to the other goals of the lawsuit was relevant only to the determination of the size of a reasonable fee, "not to eligibility for a fee award at all." *Id.* at 790. The court reiterated that success on *any* significant issue in litigation conferred prevailing party status. *Id.* at 791 (emphasis supplied).

The district court noted that the Scott plaintiffs intervened "for the limited purpose of addressing the configuration of a relatively small geographic area in the vicinity of East St. Louis, Illinois, contained in one of the pretrial *Hastert* plans." 794 F. Supp. at 259. The court went on to conclude that

> [p]laced in the context of arduous . . . proceedings conducted to review only redistricting plans for the entire state, the *Scott* [plaintiffs'] fleeting presence to address their concerns regarding a tiny fraction of the state, their neutral stance regarding the merits of the principal issue to be litigated and their absence from the trial proceedings compel the conclusion that they do not constitute a statutory prevailing party . . . .

Id. (internal quotation marks omitted). Certainly, the district court is correct that, in terms of the entire redistricting process, the Scott plaintiffs' claims were not particularly expansive. Under the "central issue" test, they perhaps would not be entitled to fees. But the Supreme Court has rejected that analysis. We find that the configuration of any of Illinois' 20 congressional districts was a significant issue in the litigation, and, after *Garland*, success on any such issue is enough to trigger an award of fees. Under this standard, the Scott plaintiffs undoubtedly prevailed. They urged that the congressional districts encompassing East St. Louis be configured in a particular way. They convinced the Hastert group to incorporate their proposed configuration into the Hastert master plan.

When the district court adopted the Hastert plan, the Scott group accomplished everything it set out to achieve.[12] Thus, they too prevailed.

The result with respect to the Urban League plaintiffs is much less clear. In finding that the League plaintiffs did not prevail, the district court observed that these plaintiffs, like the Scott plaintiffs, focused their attention on a small portion of the state, in this case the four minority districts in Chicago. It further noted that while the Urban League plaintiffs' proposed map "closely tracked the *Hastert* configuration of the minority districts," they nonetheless "chose to proceed on the basis of their own separate map." 794 F. Supp. at 260.

As we noted in our discussion of the Scott plaintiffs, the fact that the Urban League group focused its attention on only a small part of the state does not preclude it from being declared a "prevailing party," *see Hensley*, 461 U.S. 424. According to the district court's analysis, whether the Urban League plaintiffs prevailed, then, turns on the determination that they proceeded on the basis of their own separate map, rather than adopting the Hastert map.

The Chicago Urban League group entered the litigation in order to assure that—in the context of creating an Hispanic majority district—the strength of the three African-American majority districts not be diluted. This was the League group's purpose and, if they achieved it, they prevailed. In first bringing suit, they submitted a proposed map for these four districts (one Hispanic and three African-American). But as the litigation progressed the dif-

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[12] It is of no consequence that the Scott group achieved its goals without litigating to the bitter end. Indeed, the Supreme Court has held that a party who achieves success by settling is entitled to attorney's fees. *Maher v. Gagne*, 448 U.S. 122, 129 (1980). All that is important is for the party to obtain the "substance of what [it] sought." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). The Scott plaintiffs undeniably did so.

ferences among the various parties' positions narrowed. In fact, before trial it became clear that both of the proposed state-wide maps (the ones proposed by the Rosebrook and Hastert groups), called for the creation of an Hispanic majority district. The Hispanic Nieves plaintiffs, their goal achieved, essentially dropped out of the litigation, and the African-American Nieves plaintiffs joined forces with the Urban League group. Thus, at a pre-trial hearing on October 3, 1991, an attorney for the African-American Nieves plaintiffs said that "the Nieves African-American plaintiffs and the Urban League are, have taken identical positions," and noted that "those two parties would merge into one" at trial. Later in that same pre-trial hearing, an attorney for the Urban League plaintiffs noted that they were negotiating with the Hastert group, and that if those negotiations proved successful, they might, at trial, "formally request that they adopt the Hastert amended map."

While no such motion was made during the trial, the negotiations continued, and on October 15, 1991, the Hastert plaintiffs filed with the court their third amended redistricting plan. That plan incorporated changes worked out with the African-American Nieves and Urban League plaintiffs. Following the trial, the African-American Nieves and Urban League plaintiffs filed a joint post-trial brief, and in it they called on the court to adopt the third amended Hastert map. The court ultimately did so. 777 F. Supp. at 662.

The substance of the debate at this point focused on the identity of the congressional district in which to locate Chicago's Second Ward. The Second Ward had historically been part of the First Congressional District, but the Rosebrook map would have moved it into the neighboring Seventh District. The Hastert map, however, left the Second Ward in the First District. In adopting the Hastert map, the position urged by the Urban League group—that Chicago's Second Ward remain part of the First Congressional District—prevailed.[13]

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[13] Hon. Bobby Rush, alderman from the Second Ward, was in 1992 elected to Congress to represent the First District.

The failure of the Urban League plaintiffs formally to move the court to adopt the Hastert map, as their lawyer suggested in a pre-trial conference that they might, could conceivably constitute grounds for concluding that they *did not* adopt the Hastert map and therefore that they did not prevail. While the district court did not explain the basis of its determination, perhaps it relied on the failure of the Urban League plaintiffs to make such a motion in concluding that they proceeded "on the basis of their own separate map." 794 F. Supp. at 260. But such a conclusion strikes us as exceedingly formalistic, and is difficult to reconcile with the district court's conclusion that the Nieves plaintiffs—whose position merged with that of the Urban League group—*did* adopt the Hastert map. The issue before us is whether the district court abused its discretion in finding that the Nieves plaintiffs prevailed while the Urban League plaintiffs did not. We must bear clearly in mind that there can be no abuse of discretion if any rational person could agree with the conclusion of the district court. Admittedly, the task of the Nieves plaintiffs in achieving prevailing party status is easier since their predominant goal was to devise a district with an Hispanic voting majority. This is a clear goal that was clearly achieved. The Urban League plaintiffs, on the other hand, had the more complicated goal of achieving the Hispanic district while protecting against diluting the three pre-existing African-American districts. As the process unfolded, the League plaintiffs (in alliance with the African-American Nieves plaintiffs) also argued for the inclusion of the Second Ward (where Bobby Rush—a potential congressional candidate—was a resident[14]) in the First Congressional District. The Hayes-Collins group wanted to move the Second Ward (and Rush) into the Seventh District.

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[14] While the Constitution requires only that a representative be an "Inhabitant of that State in which he shall be chosen," U.S. Const., Art. I, § 2, candidates who reside in the district they are seeking to represent surely have an electoral advantage over those who live in other districts.

The League plaintiffs thus "prevailed" as to the creation of the Hispanic district, the preservation of three African-American districts and retention of the Second Ward in the First District. As noted, however, the Urban League plaintiffs did not move formally to *themselves* adopt the Hastert map, although they did call on the district court to adopt that map. This is surely an extraordinarily fine distinction, almost irrelevant to the substance of the redistricting process. The question is whether it is a distinction that might recommend itself to at least one rational decision-maker. After much thought we believe this distinction cannot pass even that test. We think therefore that the Urban League must also be considered a prevailing party.

That leaves the appeal by the Rosebrook plaintiffs. Because the Rosebrook plaintiffs did not timely petition the district court to reconsider its November 6 order, we do not have the benefit of the district court's determination whether they were a prevailing party.[15] But we nevertheless affirm the district court's November 6 order denying them fees, because we consider it entirely clear that they are not prevailing parties. In the end, the district court was faced with a choice between two maps, one put forward by the Hastert group (favoring Republicans) and another put forward by the Rosebrook plaintiffs (favoring Democrats). In its November 6 order, the court found that the Hastert map better satisfied the constitutional and statutory criteria, and thus adopted the Hastert plan. The Rosebrook group now argues that it was a substantial factor in eradicating conduct that violates the Voting Rights

[15] We know only that when the Rosebrook plaintiffs moved the district court to reconsider its December 27 decision to deny their Rule 59(e) motion for reconsideration as untimely filed, the district court denied the motion as moot, in light of its January 17 order. But we do not know for certain whether the district court considered the motion moot because, in its view, the Rosebrook plaintiffs did not prevail, or rather because it held in its January 17 order that even the prevailing parties were not entitled to attorneys' fees.

Act. *See Maloney v. City of Marietta*, 822 F.2d 1023 (11th Cir. 1987). But redistricting cases like this one are unlike ordinary voting rights cases. As we have noted, in the redistricting context the touchstone for whether a party "prevails" is simply whether that party's map (or the map the party ultimately embraces) is ultimately adopted. We thus have relatively little difficulty concluding that the Rosebrook plaintiffs are not prevailing parties, and thus not entitled to attorneys' fees.

In sum, we agree with the district court that the Hastert and Nieves groups did prevail. But we disagree with its conclusions regarding the Scott group and the Urban League group. And we find that they too, were prevailing parties. As a result, the Hastert, Nieves, Scott and Urban League groups are prima facie entitled to fees. The Rosebrook plaintiffs, who did not prevail, are not entitled to fees.

III.

Our analysis does not end here, however, since the district court went on to find that the existence of "special circumstances" precluded an award of fees even to prevailing parties. Although the fee shifting statutes commit fee awards to a district court's discretion, such discretion is, as previously noted, quite narrow once prevailing party status has been determined. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). And we find that the reasons given by the district court for denying fees to prevailing parties in this case are inadequate.

The district court stated that "Congress' primary purpose in providing attorney's fees in civil rights litigation . . . was 'to eliminate financial barriers to the vindication of constitutional rights . . . .'" 794 F. Supp. at 260 (quoting *Seattle School District v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982)). The court went on to note that the plaintiffs in this case "do not appear to be drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting [fee-shifting statutes]." *Id.* The district court is wrong on this point for two reasons. First, despite the

fact that certain of the plaintiffs in this matter were elected officials, there is no evidence that they were particularly wealthy. Second, and more importantly, the Supreme Court has consistently held that a plaintiff's ability to pay for legal representation is not a special circumstance justifying denial of attorneys' fees. *See, e.g., Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

The district court also asserted that an award of fees would be unjust because "the plaintiffs merely shifted the legislative lobbying process that typically attends congressional redistricting to a federal judicial arena." 794 F. Supp. at 261. This might be true, but it is hardly a reason to deny attorneys' fees. It is surely regrettable that the Illinois General Assembly was unable to enact a new congressional district scheme and that the taxpayers of the State of Illinois must now pay for their dereliction. But such is the case whenever the political branches of government fail to vindicate important rights and the affected parties must seek a judicial hearing. There can be no doubt, moreover, that fee awards may issue against state and local governments. *Hutto v. Finney*, 437 U.S. 678, 694 (1978). Thus, the State Board of Elections, as an agency of the state, may properly be held accountable for the prevailing parties' attorneys' fees.[16]

In reviewing these thorny fees matters in this redistricting case, we recognize the perhaps peculiar circumstances of redistricting cases generally. Here, all of the plaintiffs "contributed" to the final result in the sense that, by taking positions that were more or less, in whole or in part, "incorporated" into the accepted map, all parties arguably

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[16] It is of no consequence that the State Board of Elections played no active role in the proceedings and agreed to enforce whatever plan the district court adopted, since fees may be taxed even against entities whose role is limited to enforcement of regulations they played no role in promulgating. *Crosby v. Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982). Nor is the Board's putative "good faith" a special circumstance justifying a refusal to award fees. *Lampher v. Zagel*, 755 F.2d 99, 104 (7th Cir. 1985).

helped move the process forward toward its eventual culmination. On the other hand, there may be greater or lesser, formal or substantial, differences between the maps of the "winners" and the maps of the "losers." The Hastert, Nieves, Scott and Urban League plaintiffs have been declared the winners because exactly what they advocated has been accepted.

The State Board of Elections, the nominal defendant, has no interest in the eventual outcome except that there *be* an outcome which it can implement. Yet the State Board may be held liable for fees to the prevailing parties, whose status as such depends upon the *relative* success of their position in relation to the success of the other plaintiffs. These configurations of claim to liability and of success to failure are essentially unique to redistricting cases. In such cases, liability is usually imposed on a neutral (and nominal) defendant, and successful fees claims are awarded to the *relatively* successful plaintiffs. In this case, we are attempting to apply principles developed in a wide range of civil rights cases to the *sui generis* category of redistricting cases. As might be expected, these principles do not provide a close fit to this subject matter. It might be appropriate and helpful, by statute or otherwise, to develop a set of rules specifically governing attorneys' fees in redistricting cases, but that is not our task here.

For the foregoing reasons, we REVERSE the judgment of the district court insofar as it held that the Scott group and the Urban League group are not prevailing parties, and AFFIRM the district court's judgment that the Hastert and Nieves plaintiffs are prevailing parties. We also REVERSE the district court's determination that special circumstances exist so as to preclude the award of attorneys' fees to prevailing parties, and AFFIRM the court's determination that the Rosebrook group is not entitled to attorneys' fees. Finally, we REMAND the case with instructions to award reasonable attorneys' fees to the prevailing parties.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS

COFFEY, *Circuit Judge*, dissenting. As I discuss *infra* at 27-29, I reiterate my previous objections filed in the original panel opinion. *See Hastert v. State Board of Elections*, Nos. 92-1397 et al., slip op. at 21-24 (7th Cir. Dec. 17, 1993) (Coffey, J., dissenting). Additionally, I agree with the majority's determination in its amended opinion that the Rosebrook plaintiffs are not prevailing parties. In litigation of this nature, the various plaintiff's groups are competing against each other and in this case the court determined that the Hastert plan prevailed over the Rosebrook plan. Based on the lower court's selection of the Hastert plan, the Rosebrook plaintiffs cannot be viewed as prevailing parties.

As an initial matter, I agree with the majority that the November 6, 1991 district court opinion disposed of the attorneys' fees with the phrase "all parties to these consolidated cases bear their own costs." *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 662 (N.D. Ill. 1991) (*Hastert I*). I fail to understand the need for the majority's extensive criticism of the district court in regard to the attorneys' fees. In the lower court's subsequent opinion, *Hastert v. Board of Elections*, 794 F. Supp. 255 (N.D. Ill. 1992) (*Hastert II*), it treated the phrase "all parties to these consolidated cases bear their own costs" as resolving the attorneys' fees question. The three-judge district court was obviously in the best position to know whether it intended to deny attorneys' fees. Rather than criticizing the court for its holding, we should accept the lower court's interpretation of its own order and proceed to the merits of the instant appeal.

Secondly, I disagree with the majority's determination in the amended opinion to add the Chicago Urban League as a prevailing party.[1] The majority holds that the Urban

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[1] In the original opinion, the majority ruled that the Urban League was not a prevailing party because "the Chicago Urban League plaintiffs insisted on their own map. They did not get it. On an issue like this, where either result would have been sustainable, the district court is in the best position to determine whether fees are appropriate. Here the district court did not abuse its discretion." *Hastert*, slip op. at 16-17 (7th Cir. Dec. 17, 1993).

League prevailed because (1) the League indicated prior to trial that it *might* adopt the Hastert plan, and (2) the League's goals (a Hispanic majority district and three African-American majority districts) were achieved through the Hastert plan. The district court ruled that the Urban League had not prevailed since it failed to adopt the Hastert plan and instead proceeded on its own separate map; the League's attorneys never followed through on the representation that they might "formally request that [the League] adopt the Hastert amended map." The majority originally agreed with the trial court but in the amended opinion changes course and reasons that such a distinction is too formalistic. I disagree. Rather than being formalistic, the district court properly refused to reward a plaintiff who was hedging its bets. Counsel for the Urban League was attempting to play both sides against the middle and accomplish the League's goals without committing to a position. By indicating before trial that it was contemplating adoption of the Hastert plan, but then never formally adopting that plan, the Urban League was able to reap the benefit of being "on board" the Hastert plan but if the district court ultimately adopted the Rosebrook plan, the Urban League attorneys had positioned themselves to present another argument that it prevailed based in part on the fact that it had never adopted the Hastert plan. A court of appeals should not fall prey to trial tactics of this nature.

The lower court ruled that the Urban League did not prevail and who is in a better position than the trial court to make that determination? I am unwilling to hold that the trial court abused its discretion on this matter, moreover, I am unaware of any case law warranting the reversal of the district court for *"[a] decision on a fee award is left to the discretion of the district court in light of its superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. . . . A district court does not abuse its discretion . . . if reasonable persons could differ over the view it adopts." McNabola v. Chicago Transit*

Authority, 10 F.3d 501, 518 (7th Cir. 1993) (citations and quotation marks omitted) (emphasis added). *As far as I know*, McNabola *is the law of the Seventh Circuit. The fact that the majority has changed its mind (from the first to the second opinion) about whether the Urban League prevailed is certainly evidence that "reasonable persons could differ" and mandates that the trial court did not abuse its discretion. Id.* An appellate court should be extremely reluctant to hold that the knowledgeable and experienced members of the three-judge panel abused their discretion. Moreover, simply because the Nieves plaintiffs, who did prevail, had some goals in common with the League (creation of Hispanic majority district), does not warrant the conclusion that the League also prevailed. In this instance, the trial court made findings on the very same factual issues the panel majority raises, i.e., the role the Urban League played in creating the four minority congressional districts, and the trial court found that the League ultimately "chose to proceed on the basis of their own separate map." *Hastert II*, 794 F. Supp. at 260. This finding was not an abuse of discretion.

Regardless of which parties prevailed, I continue to adhere to the position enunciated in my prior dissenting opinion agreeing with the three-judge district court[2] that *special circumstances mitigate against an award of attorneys' fees. Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The district court found special circumstances render an award of attorneys' fees "unjust" in a case where (1) "the Board has played no active role in these proceedings and agree[d] to abide by the judgment of th[e] court," *Hastert I*, 777 F. Supp. at 639, (2) the litigation only involves plaintiffs' groups vying against one another and above all, (3) the redistricting should have occurred in the state legislative forum where attorneys' fees were unavailable. I remain of the opinion that this court should consider *en banc* whether

[2] *Hastert II*, 794 F. Supp. at 260-61.

the district court's interpretation of the fee statute is improper.

The amended majority opinion makes it even more clear that special circumstances make an award of fees in this type of case "unjust." *Id.* In deciding to confer prevailing party status on all but the Rosebrook plaintiffs and then proceeding to award the prevailing parties attorneys' fees, the majority obviously found it necessary to and did in fact expand the parameters of the standard for determining prevailing party status. A decision of this nature will only invite more challenges in redistricting litigation by encouraging special interest litigants to jump on the bandwagon (1) hire counsel, (2) draft a redistricting plan reflecting their own special concerns, (3) join in the statewide plan with the greatest chance of success, and (4) saddle the taxpayers with payment of their attorneys' fees under this newly created standard. Moreover, I am fearful that the majority opinion will accomplish nothing but to encourage groups like those before us to stonewall during the state legislative process (preventing the legislature from timely drafting a redistricting map) and then shift the battle to the federal courtroom where the plaintiffs' attorneys can receive a windfall of compensation for their services at the taxpayers' expense.[3]

Neither the State of Illinois nor any other governmental body should be responsible for the attorneys' fees of the

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[3] The majority suggests that the legislature's inability to draft a redistricting plan was due in part to the fact there was a Republican governor and a Democratic legislature. This attempt at assigning blame is in error because the legislature, which was controlled by one party, never even passed or voted on a plan. Thus, the Republican governor was not called upon to sign any legislation. The failure to pass redistricting legislation was likely attributable to the various plaintiff groups vying against one another. The fact that Illinois failed to pass redistricting legislation following the census of 1970 and 1980 is of little consequence for in those years, one party controlled the house and the other controlled the senate.

prevailing parties in litigation involving a truly nominal defendant who played no active role in the proceedings. Attorneys' fees awards are especially uncalled for when the unmeritorious claims are based primarily on the litigants' partisan interests, i.e., drawing the most favorable redistricting boundries, as opposed to protection of recognized constitutional rights of aggrieved parties. As I stated in my prior dissent, fee shifting in civil rights litigation is not intended to result in a "windfall" for attorneys, yet that is precisely what occurred in this instance. *Farrar v. Hobby*, 113 S. Ct. 566, 575 (1992).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Dated December 17, 1993]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-1397, 92-1398, 92-1399,
92-1402 and 92-1403

DENNIS J. HASTERT, HARRIS FAWELL,
JOHN E. PORTER, PHILIP M. CRANE,
HENRY J. HYDE, and ROBERT H. MICHEL,

Plaintiffs,

and

JOHNNY SCOTT and BEN HOWARD,

Intervenor Plaintiffs-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTION
COMMISSIONERS, JOHN J. LANIGAN,
THERESA M. PETRONE, RICHARD A. COWEN,
LAWRENCE E. JOHNSON, DAVID E. MURRAY,
LANGDON D. NEAL, WANDA L. REDNOUR and
HANNELORE HUISMAN,

Defendants-Appellees.

DENNIS J. HASTERT, HARRIS FAWELL,
JOHN E. PORTER, PHILIP M. CRANE,
HENRY J. HYDE, ROBERT H. MICHEL,
and THOMAS W. EWING,

Plaintiffs-Appellants,

v.

(Caption continued on following page)

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, WANDA L. REDNOUR and HANNELORE HUISMAN,

Defendants-Appellees.

WILFREDO NIEVES, AL JOHNSON, LINDA CORONADO, BOBBY RUSH, JESUS GARCIA, REV. WILLIE BARROW, RAFAEL BORIA, MIGUEL DEL VALLE, ROBERT L. LUCAS, LEON D. FINNEY, JR., REV. CLAY EVANS, JOSEPH GARDNER, LUIS V. GUTIERREZ, REGNER SUAREZ, JOSEPH BERRIOS, MIGUEL A. SANTIAGO, and NEOMI HERNANDEZ,

Plaintiffs-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTION COMMISSIONERS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA L. REDNOUR,

Defendants-Appellees.

THE CHICAGO URBAN LEAGUE, CRAIG R. COLLINS, MARK ALLEN, and NIKOLAS C. THEODORE,

Plaintiffs-Appellants,

v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, JOHN P. DAILEY, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA L. REDNOUR,

Defendants-Appellees.

(Caption continued on following page)

ANN ROSEBROOK, DARYL BARKLOW,
AMIEL CUETO, RICHARD MARK,
JEANELLE NORMAN, CAROLYN TONEY,
LEE BABCOCK, RAYMOND OLIVER,
BARBARA POSHARD, WILLIAM MATTHEWS,
GERALD HAWKINS, and EVA SAVALA,

Plaintiffs-Appellants,

v.

STATE BOARD OF ELECTIONS,
JOHN J. LANIGAN, THERESA M.
PETRONE, RICHARD A. COWEN,
HANNELORE HUISMAN, LAWRENCE E.
JOHNSON, DAVID E. MURRAY,
LANGDON D. NEAL and WANDA L. REDNOUR,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 91-C-4028, 91-C-4154, 91-C-4643, 91-C-4656 and 91-C-5472—
Michael S. Kanne, Charles R. Norgle, Sr., and
Suzanne B. Conlon, *District Judges.*

ARGUED JANUARY 7, 1993—DECIDED DECEMBER 17, 1993

Before CUDAHY, COFFEY and ROVNER, *Circuit Judges.*

CUDAHY, *Circuit Judge.* We are asked here to review a decision of a three-judge district court denying attorneys' fees to certain parties involved in litigation regarding congressional redistricting in Illinois following the 1990 census. We are presented initially with some rather puzzling jurisdictional questions. To resolve them, we must recount the procedural history of this litigation in regrettably copious detail.

Because Illinois' population grew during the 1980s at a rate slower than that of the United States as a whole, the number of congressional seats apportioned to Illinois was reduced from 22 to 20. The task thus fell to the Illinois legislature to implement a constitutionally acceptable congressional redistricting plan, taking into account the fewer districts allocated to the state.[1] This is not an easy task under any circumstances, but it may be virtually impossible when the governor is of a different political party than a majority of the members of both houses of the legislature.[2] Such was the situation in Illinois in 1991. And, quite predictably, the Illinois General Assembly failed to enact a redistricting plan by the constitutionally mandated June 30, 1991 deadline. Indeed, the legislature failed even to bring a redistricting plan to the floor for debate.

Anticipating this legislative deadlock, the Republican Party members of the Illinois congressional delegation (the "Hastert" plaintiffs or group) filed the initial action in this matter on June 27, 1991. The Hastert plaintiffs sought a declaration that the present Illinois congressional districts were unconstitutional because of changes reflected in the 1990 census. They also sought to enjoin the Illinois State Board of Elections from conducting the 1992 congressional elections under the congressional district plan then in effect, and submitted their own redistricting proposal to replace the outdated map. The Chief Judge of this court convened a three-judge district court to hear the case, as 28 U.S.C. § 2284(a) requires.

On July 3, 1991, a group of Hispanic and African-American voters (the "Nieves" plaintiffs or group) filed a similar

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[1] Article 4, § 3(b) of the Illinois Constitution states, "In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative and Representative Districts."

[2] Redistricting plans are within the veto power of an Illinois governor. *See Williams v. Kerner*, 30 Ill. 2d 11, 195 N.E.2d 680 (1964).

action. In addition to the relief requested by the Hastert group, the Nieves plaintiffs sought the creation of a congressional district containing a majority of Hispanic voters which, they maintained, section two of the Voting Rights Act, 42 U.S.C. § 1973, required. The Nieves and Hastert actions were later consolidated.

On July 24, 1991, a group of voters ostensibly acting on behalf of certain members of the Illinois congressional delegation affiliated with the Democratic Party (the "Rosebrook" plaintiffs or group) filed still another similar action, which was subsequently consolidated with the Hastert and Nieves cases. On the same day, Representative Cardiss Collins and Representative Charles Hayes, along with several voters from their respective African-American majority districts (the "Collins" plaintiffs or group), filed a fourth action that was also consolidated with the Hastert and Nieves cases. Finally, the Chicago Urban League, purporting to represent the interests of voters in the existing African-American majority congressional districts (the "Chicago Urban League" plaintiffs or group), filed its own suit on August 29, 1991. This too was consolidated with the others.[3]

The district court issued its decision on the merits on November 6, 1991, enjoining the Board from using the existing congressional district plan and ordering it to put into effect the plan proposed by the Hastert plaintiffs. *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). In the final sentence of its opinion, the district court ordered that "all parties to these consolidated cases bear their own costs." 777 F. Supp. at 662. On November 14, 1991, the Hastert, Nieves, Chicago Urban League and Scott groups moved the district court to

[3] Several individuals and organizations were permitted to intervene in the consolidated action, including Johnny Scott and Ben Howard (the "Scott" plaintiffs or group), acting individually and as representatives of local chapters of the National Association for the Advancement of Colored People.

alter or amend its judgment to award them costs as prevailing parties. They also filed a petition for an award of their respective attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. On November 21, 1991, the Collins plaintiffs moved the court for leave to file a petition for attorneys' fees. Also on November 21, the Rosebrook plaintiffs filed a Rule 59(e) motion to alter or amend the judgment.[4] While this motion was still pending, the Rosebrook plaintiffs filed, on December 24, 1991, a motion for leave to file a petition for attorneys' fees and expenses.

The district court denied the Rosebrook plaintiffs' Rule 59(e) motion on December 27, 1991, and on January 7, 1992, the court denied as untimely their motion for leave to file a petition for fees. On January 13 the Rosebrook group moved the court to reconsider its denial of their fee motion. On January 17, 1992, the district court issued a memorandum opinion denying the Hastert, Nieves, Collins, Chicago Urban League and Scott groups' motions for costs and attorneys' fees. *Hastert v. State Board of Elections*, 794 F. Supp. 255 (N.D. Ill. 1992). In the same opinion, the court ordered that the cost of publishing notices of the action in newspapers throughout the state be divided equally among the Hastert, Nieves, Rosebrook and Collins groups. 794 F. Supp. at 261. Four days later, on January 21, the court denied as moot the Rosebrook plaintiffs' January 13 motion for reconsideration.

On January 28, the Nieves plaintiffs moved the district court to reconsider its January 17 decision denying attorneys' fees. The Hastert plaintiffs filed an identical motion on January 29. On January 31, the Collins plaintiffs moved

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[4] The Rosebrook plaintiffs asked the court to amend its judgment to state that the Hispanic majority district proposed by the Hastert plaintiffs, and later adopted by the court, was substantially similar to the Hispanic majority district proposed by the Rosebrook plaintiffs. The apparent purpose of this motion was to buttress the Rosebrook plaintiffs' claim that they were prevailing parties and thus entitled to attorneys' fees.

the court to reconsider its denial of attorneys' fees and its allocation of the costs of publishing notice. The district court has never ruled on these motions. Several plaintiff groups next sought to vest jurisdiction in this court. The Scott plaintiffs on February 13, the Hastert and Nieves plaintiffs on February 14, and the Chicago Urban League group on February 18, filed notices of appeal with respect to the district court's January 17 decision denying attorneys' fees. Also on February 18, the Rosebrook plaintiffs filed a notice of appeal with respect to the district court's November 6, 1991, judgment, as well as from the December 27 order denying their motion to alter or amend that judgment, the January 7, 1992, order denying their motion for leave to file a petition for fees, the January 17 opinion and the January 21 order denying their motion to reconsider. The Collins plaintiffs had not filed a notice of appeal by the time these cases were set for argument on appeal.[5]

We have jurisdiction here, if at all, pursuant to 28 U.S.C. § 1291, which vests in the courts of appeals jurisdiction over "all final decisions of the district courts of the United States." As an initial matter, we note that we do not have jurisdiction over the merits of this case because such appeals must be made directly to the United States Supreme Court. *See* 28 U.S.C. § 1253 ("[A]ny party may appeal to the Supreme Court from an order [pertaining to an] injunction in any . . . action . . . required . . . to be heard and determined by a district court of three judges.") and 28 U.S.C. § 1291 (courts of appeals have jurisdiction of appeals from final decisions of the district courts "except where direct review may be had in the Supreme Court").[6]

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[5] On February 27, 1992, the Collins' plaintiffs moved the district court to rule on its motion for reconsideration of the denial of fees. The court has yet to dispose of this motion.

[6] Accordingly, the Rosebrook plaintiffs' notice of appeal is ineffective to the extent it seeks review of the merits of the district court's redistricting decision.

Appeal from the district court's denial of attorneys' fees, however, is properly made to this court. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n.16 (1980) (Supreme Court does not have jurisdiction under § 1253 if only attorneys' fees questions are appealed). It thus follows that awards of attorneys' fees are appealable independent of the merits and constitute separate judgments for purposes of § 1291. *People Who Care v. Rockford Board of Education District No. 205*, 921 F.2d 132, 134, 135 (7th Cir. 1991). But such fee awards, or in this case denials, must be final in order to trigger our § 1291 jurisdiction.

The district court's November 6 opinion was unquestionably a final decision on the merits. But there is a considerable question whether it said anything, final or otherwise, about attorneys' fees. The only pronouncement of the district court in its November 6 opinion that might be construed to reach the attorneys' fees issue is its final sentence: "[P]arties to these consolidated cases shall bear their own *costs*." 777 F. Supp. at 662. Sections 1973*l*(e) and 1988 provide that "prevailing parties" in actions to enforce constitutional voting guarantees and certain provisions of the civil rights laws are entitled to "a reasonable attorney's fee as part of the *costs*." Thus, there is no logical impediment to concluding that the district court's November 6 decision resolved, albeit *sub silentio*, the parties' entitlement to attorneys' fees. However, we are not entirely convinced that this is a correct view, and we are quite certain that the language of the district court, if intended to deal with attorneys' *fees* (in addition to routine court *costs*) was ill-chosen. Indeed, it would not be irrational to conclude that the district court's order had nothing to do with attorneys' fees.

Federal Rule of Civil Procedure 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The Supreme Court has instructed that 28 U.S.C. § 1920 defines the term "costs" as it is used in Rule 54(d). *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). Section 1920 au-

thorizes the taxation of certain rather routine litigation expenses, including clerk, marshal and court reporter fees, "as costs." Although Rule 54(d) creates a presumption that the prevailing party will recover these costs, the decision to make the award of costs is entrusted to the sound discretion of the district court. *Soler v. Waite*, 989 F.2d 251, 254-55 (7th Cir. 1993). As a result, district courts routinely direct that prevailing parties are not entitled to Rule 54(d) costs through concise orders, frequently no longer than a single sentence. *See, e.g., Tolle v. Carroll Touch, Inc.*, 813 F. Supp. 1368 (C.D. Ill. 1993); *Harlan E. Moore Charitable Trust v. United States*, 812 F. Supp. 130 (C.D. Ill. 1993); *Nalco Chemical Co. v. Hydro Technologies, Inc.*, 809 F. Supp. 672 (E.D. Wis. 1992); *Ridgefield Park Transportation v. Uhl*, 803 F. Supp. 1467 (S.D. Ill. 1992). The district court's November 6 "tag line" that the parties to this litigation were to "bear their own costs" is arguably an adequate exercise of its discretion to deny Rule 54(d) costs, as that term is defined by 28 U.S.C. § 1920.[7] But attorneys' fees would seem to be "costs" of a different sort.

Before the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), many federal courts believed that they had the power in certain cases, contrary to the so-called "American" rule that parties are to bear their own costs of legal representation, to award attorneys' fees to prevailing parties as a component of Rule 54(d) costs. In *Alyeska*, however, the Court disapproved this practice and held that federal courts may order the losing party to pay the winner's attorneys' fees only if Congress has authorized such fee awards by statute. *Id.* at 263-64. There is no dispute that sections 1973*l*(e) and 1988 are statutes of this type nor, as a result, is there any question that the district court

[7] Hereafter, when we use the phrases "Rule 54(d) costs" or "routine Rule 54(d) costs" we will be referring to the set of costs described by 28 U.S.C. § 1920.

had the power to decide which parties to the present litigation, if any, were entitled to attorneys' fees. There is legitimate room for doubt, however, that the district court exercised this power on November 6.

It is true that even after *Alyeska* we continued to treat requests for attorneys' fees under section 1988 as motions for costs governed by Rule 54(d). *See Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 659 (7th Cir. 1981) and *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980), *cert. denied sub nom. Blinzinger v. Bond*, 454 U.S. 1063 (1981). But this is the only similarity section 1988 attorneys' fees have to Rule 54(d) costs. While district courts have broad discretion to award or deny Rule 54(d) costs, their "discretion to deny a fee award [under section 1988] to a prevailing party is narrow." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). Indeed, we have held that prevailing civil rights plaintiffs are entitled to their attorneys' fees "as a matter of course." *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). *See also Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979). Although a district court may be able to dispose of routine Rule 54(d) costs with a single, off-hand line at the end of a lengthy decision on the merits, a denial of section 1988 attorneys' fees would seem to require more deliberation.

Admittedly, we cannot know with any degree of certainty whether the district court considered the attorneys' fee issue before issuing its November 6 opinion. We note, however, that the district court's January 17 decision on this issue occupies five pages in the Federal Supplement. There is something troubling about disposing of a matter with a single line (and with no explicit reference to fees) that later requires resolution by a thorough written opinion. Moreover, we have found nothing in the record to suggest that the parties put the fees issue properly before the district court until they filed their petitions for fees at various times *after* November 6. Nevertheless, the district court stated its view that it had indeed addressed the question of attorneys' fees in its November

6 opinion. 794 F.Supp. 258. The district court is in the best position to interpret its own orders, and we will not disturb such an interpretation absent a clear abuse of discretion. *In the Matter of Chicago, Rock Island & Pacific R.R.*, 865 F.2d 807, 810 (7th Cir. 1988). Therefore, although the form of the November 6 opinion creates puzzling ambiguities and procedural difficulties and may be misleading to litigants, the district court's interpretation of this opinion is not a clear abuse of discretion.

Characterizing the November 6 opinion as a final decision both on the merits and as an award of attorneys' fees has important jurisdictional consequences. Specifically, if the parties wished to challenge such a denial of attorneys' fees they had only two choices. They could appeal the decision within thirty days, Fed. R. App. P. 4(a)(1), or they could toll the time for appeal by filing a Rule 59(e) motion to alter or amend judgment within ten days, exclusive of weekends and holidays. None of the parties chose to appeal the November 6 order insofar as it pertained to attorneys' fees. The Hastert, Nieves, Chicago Urban League and Scott groups, however, did file a timely Rule 59(e) motion on November 14.[8] The district court denied this motion on January 17. The Hastert, Nieves, Scott and Chicago Urban League plaintiffs all filed timely no-

[8] Actually, these groups filed a motion to alter or amend judgment *and* a petition for attorneys' fees pursuant to section 1988. Ordinarily, such a petition for attorneys' fees would not be a proper Rule 59(e) motion. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982). But because we have adopted the district court's view that it considered and denied attorneys' fees in its November 6 opinion, the later petition for such fees must be construed as a Rule 59(e) motion. Under our cases, all substantive motions served within ten days of the entry of judgment are treated as filed under Rule 59(e). *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). The petition for attorneys' fees was filed within ten days of the November 6 entry of judgment and it was substantive in the sense that it asked the district court to reverse its earlier denial of fees.

tices of appeal from this denial.[9] We thus have jurisdiction over their appeals.

The Rosebrook group, however, waited until December 24 to file a petition for attorneys' fees, well past the ten day limit for filing an appeal-delaying Rule 59(e) motion. The district court properly denied this petition as untimely.[10] The Rosebrook group may well have been misled by the terse nature of the district court's ruling on "fees" as we have indicated above. But, by deciding to honor the district court's characterization of its own order of November 6, we must correspondingly rule that the Rosebrook group was late. Those plaintiffs moved the district court to reconsider this motion. The court denied the motion to reconsider on January 21, and the Rosebrook plaintiffs filed a notice of appeal on February 18. We thus have jurisdiction over the Rosebrook's appeal only to the extent that it requests review of the district court's January 21 decision. Such review is, of course, exceedingly narrow. We are only permitted to consider whether the district court erred in denying the Rosebrook group's motion to reconsider the denial of a Rule 60(b) motion.

Thus having ascertained our jurisdiction, we now turn to the merits. Under 42 U.S.C. § 1973*l*(e), a court "in its discretion, may allow the prevailing party a reasonable

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[9] In addition to appealing to this court, the Hastert and Nieves plaintiffs also moved the district court to reconsider its January 17 decision. Since the district court has not resolved these motions, one might think that their appeals are premature. But successive requests to alter or amend judgment, which are all these motions amount to, do not toll the time for appeal, *United States Equal Employment Opportunity Comm'n. v. Gurnee Inns, Inc.*, 956 F.2d 146, 148 (7th Cir. 1992), nor do they affect the finality of the judgment. *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986).

[10] Because the Rosebrook's petition for attorneys' fees was filed almost two months after the entry of judgment, it cannot be a Rule 59(e) motion. Under *United States v. Deutsch*, 981 F.2d 299, 301 (7th Cir. 1992), it must be construed as a motion for relief from judgment filed pursuant to Fed. R. Civ. P. 60(b).

attorney's fee" in an action, such as this one, "to enforce the voting guarantees of the fourteenth or fifteenth amendments." Pursuant to 42 U.S.C. § 1988, a court may make a similar award of fees to a "prevailing party" in a suit to enforce the provisions of 42 U.S.C. § 1983.[11] Although the statutes commit fee awards to the district court's discretion, Congress has nevertheless made clear that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. 925, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 807 (addressing § 1973*l*(e)); S. Rep. 1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (addressing § 1988). In any event, our analysis begins by determining which parties, if any, prevailed.

This is not ordinary litigation. Most notably, the underlying controversy in this case, i.e., the fight over the configuration of Illinois' new congressional districts, was not between the plaintiffs and the defendant. The State Board of Elections is truly a nominal defendant, completely disinterested in the outcome of that fight. The real dispute was between the various plaintiffs. Each had a plan to offer and the winner, at least from a lay person's perspective, is the litigant whose map the district court adopted. Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of "prevailing party."

A party prevails, within the meaning of the fee-shifting statutes, "if [it] succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). We agree with the district court, that "the principal issue in litigation during these proceedings involved the

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[11] Because §§ 1973*l*(e) and 1988 contain nearly identical language and are driven by similar congressional purposes, we construe them similarly. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

determination of which proposed [congressional districting] plan for the entire State of Illinois best met constitutional and statutory criteria." 794 F. Supp. 259. On this score, the Hastert and Nieves groups are clear winners. The district court ultimately adopted the plan submitted by the Hastert plaintiffs, a plan which the Nieves plaintiffs formally adopted. *Id.* at 260. Thus, we find, as did the district court, that the Hastert and Nieves groups are "prevailing parties."

The district court concluded that the Scott and Chicago Urban League plaintiffs did not prevail. *Id.* at 259-60. We owe these decisions some discretion. *Shepard v. Sullivan*, 898 F.2d 1267, 1271 (7th Cir 1990). But when a district court overlooks, either intentionally or inadvertently, relevant, binding precedent, its decision cannot stand. In defining "prevailing party," the district court relied exclusively upon *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Although *Hensley* is a central case interpreting the fee-shifting statutes, the Supreme Court has provided additional guidance. In particular, the Court in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 790 (1989), rejected the so-called "central issue" test that several lower courts had adopted following *Hensley*. Under that test, a party was deemed to have prevailed only if he "prevailed *on the central issue* by acquiring the primary relief sought." *Id.* at 787 (citation omitted). In rejecting this formulation, the Court concluded that the degree of a plaintiff's success in relation to the other goals of the lawsuit was relevant only to the determination of the size of a reasonable fee, "not to eligibility for a fee award at all." *Id.* at 790. The court reiterated that success on *any* significant issue in litigation conferred prevailing party status. *Id.* at 791 (emphasis supplied).

The district court noted that the Scott plaintiffs intervened "for the limited purpose of addressing the configuration of a relatively small geographic area in the vicinity of East St. Louis, Illinois, contained in one of the pre-

trial *Hastert* plans." 794 F. Supp. at 259. The court went on to conclude that

> [p]laced in the context of arduous . . . proceedings conducted to review only redistricting plans for the entire state, the *Scott* [plaintiffs'] fleeting presence to address their concerns regarding a tiny fraction of the state, their neutral stance regarding the merits of the principal issue to be litigated and their absence from the trial proceedings compel the conclusion that they do not constitute a statutory prevailing party . . . ."

Id. (internal quotation marks omitted). Certainly, the district court is correct that, in terms of the entire redistricting process, the Scott plaintiffs' claims were not particularly expansive. Under the "central issue" test, they perhaps would not be entitled to fees. But the Supreme Court has rejected that analysis. We find that the configuration of any of Illinois' 20 congressional districts was a significant issue in the litigation, and, after *Garland*, success on any such issue is enough to trigger an award of fees. Under this standard, the Scott plaintiffs undoubtedly prevailed. They urged that the congressional districts encompassing East St. Louis be configured in a particular way. They convinced the Hastert group to incorporate their proposed configuration into the Hastert master plan. When the district court adopted the Hastert plan, the Scott group accomplished everything it set out to achieve.[12] Thus, they too prevailed.

The Chicago Urban League group, representing the purported interests of various African-American voters, sub-

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[12] It is of no consequence that the Scott group achieved its goals without litigating to the bitter end. Indeed, the Supreme Court has held that a party who achieves success by settling is entitled to attorney's fees. *Maher v. Gagne*, 448 U.S. 122, 129 (1980). All that is important is for the party to obtain the "substance of what [it] sought." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). The Scott plaintiffs undeniably did so.

mitted its own proposed minority district plan. It now claims to have been "at the forefront in both achieving settlement and in ensuring adoption of its [own] proposed configuration in the Hastert plan." Chicago Urban League's Br. at 11. These claims present close and difficult questions, and we will make several observations in attempting to determine their validity.

First, although some groups representing minority officials and voters, including the Scott group, did compromise and settle their differences with the Hastert group, *see* 777 F. Supp. 640, the Chicago Urban League plaintiffs did not. But, by remaining in the litigation with a position paralleling that of the Hastert plaintiffs, the Chicago Urban League group did help to bring about a settlement along those lines. Second, although the Chicago Urban League group's proposed minority districts "closely tracked" the Hastert plan's configuration for the same districts, the Chicago Urban League plaintiffs "chose to proceed on the basis of their own separate map." 794 F. Supp. at 260. The district court did not adopt the League's plan as such, but the plan adopted was certainly very close to that advocated by the League. Some might say that the League is in the position of a party that refused a generous settlement offer only to come up a bit short after the trial. But this point of view may place too much emphasis on a particular procedure, like formal settlement. On the other hand, congressional redistricting is a precise business, and battles often rage over slight changes in district boundaries. For example, in this litigation the Hastert group's (winning) plan contained a population deviation of 0.00017% while the Rosebrook group's (losing) plan contained a similar deviation of 0.00297%. 794 F. Supp. at 644. This case was ultimately fought along the margins. Moreover, the redistricting process is, at some level, a zero-sum affair, one plan is adopted and the rest are rejected. To the end, the Chicago Urban League plaintiffs insisted on their own map. They did not get it. On an issue like this, where either result would have been sustainable, the district court is in the best position to

determine whether fees are appropriate. Here, the district court did not abuse its discretion.

In sum, we agree with the district court that the Hastert and Nieves groups did prevail. We find, however, that the district court applied the wrong legal criteria in ascertaining the Scott plaintiffs' status. Measured by the correct standard, they too prevailed. As a result, the Hastert, Nieves and Scott groups are prima facie entitled to fees. We believe that the Chicago Urban League has a strong claim to entitlement. However, its insistence on its own map in formal opposition to the winning Hastert-Nieves map removes it sufficiently from complete "success" to support the district court's determination that it was not a prevailing party.

Our analysis does not end here, however, since the district court went on to find that the existence of "special circumstances" precluded an award of fees even to prevailing parties. Although the fee shifting statutes commit fee awards to a district court's discretion, such discretion is, as previously noted, quite narrow once prevailing party status has been determined. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). And we find that the reasons given by the district court for denying fees to prevailing parties in this case are inadequate.

The district court stated that "Congress' primary purpose in providing attorney's fees in civil rights litigation . . . was 'to eliminate financial barriers to the vindication of constitutional rights . . . .'" 794 F. Supp. at 260 (quoting *Seattle School District v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982)). The court went on to note that the plaintiffs in this case "do not appear to be drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting [fee-shifting statutes]." *Id.* The district court is wrong on this point for two reasons. First, despite the fact that certain of the plaintiffs in this matter were elected officials, there is no evidence that they were particularly wealthy. Second, and more important-

ly, the Supreme Court has consistently held that a plaintiff's ability to pay for legal representation is not a special circumstance justifying denial of attorneys' fees. *See, e.g., Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

The district court also asserted that an award of fees would be unjust because "the plaintiffs merely shifted the legislative lobbying process that typically attends congressional redistricting to a federal judicial arena." 794 F. Supp. 261. This might be true, but it is hardly a reason to deny attorneys' fees. It is surely regrettable that the Illinois General Assembly was unable to enact a new congressional district scheme and that the taxpayers of the State of Illinois must now pay for their dereliction. But such is the case whenever the political branches of government fail to vindicate important rights and the affected parties must seek a judicial hearing. There can be no doubt, moreover, that fee awards may issue against state and local governments. *Hutto v. Finney*, 437 U.S. 678, 694 (1978). Thus, the State Board of Elections, as an agency of the state, may properly be held accountable for the prevailing parties' attorneys' fees.[13]

In reviewing these thorny fees matters in this redistricting case, we recognize the perhaps peculiar circumstances of redistricting cases generally. Here, all of the plaintiffs "contributed" to the final result in the sense that, by taking positions that were more or less, in whole or in part, "incorporated" into the accepted map, all parties arguably helped move the process forward toward its eventual culmination. On the other hand, there may be greater or

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[13] It is of no consequence that the State Board of Elections played no active role in the proceedings and agreed to enforce whatever plan the district court adopted, since fees may be taxed even against entities whose role is limited to enforcement of regulations they played no role in promulgating. *Crosby v. Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982). Nor is the Board's putative "good faith" a special circumstance justifying a refusal to award fees. *Lampher v. Zagel*, 755 F.2d 99, 104 (7th Cir. 1985).

lesser, formal or substantial, differences between the maps of the "winners" and the maps of the "losers." The Hastert, Nieves and Scott plaintiffs have been declared the winners because exactly what they advocated has been accepted. Although the presence of the Chicago Urban League undoubtedly contributed to the final result, the district court—with our reluctant approval—decided against these plaintiffs because the map sought was not precisely the one adopted.

The State Board of Elections, the nominal defendant, has no interest in the eventual outcome except that there *be* an outcome which it can implement. Yet the State Board may be held liable for fees to the prevailing parties plaintiff, whose status as such depends upon the *relative* success of their position in relation to the success of the other plaintiffs. These configurations of claim to liability and of success to failure are essentially unique to redistricting cases. In such cases, liability is usually imposed on a neutral (and nominal) defendant, and successful fees claims are awarded to the *relatively* successful plaintiffs. In this case, we are attempting to apply principles developed in a wide range of civil rights cases to the *sui generis* category of redistricting cases. As might be expected, these principles do not provide a close fit to this subject matter. It might be appropriate and helpful, by statute or otherwise, to develop a set of rules specifically governing attorneys' fees in redistricting cases, but that is not our task here.

Finally, we turn to the Rosebrook plaintiffs' appeal. If we were to address this group's claims on the merits, it might be a close call, since the pro's and con's are similar to the factors affecting the Chicago Urban League plaintiffs (although the Rosebrook's map, overall, is in marked contrast to the winning Hastert map). But we cannot address the merits of the Rosebrook plaintiffs' claim since they filed their petition for fees late. We have acceded to the district court's conclusion that its November 6, 1991, decision addressed attorneys' fees. Under *United States*

v. Deutsch, 981 F.2d 299, 301 (7th Cir. 1992), substantive motions filed more than ten days after entry of final judgment are construed as motions filed under Federal Rule of Civil Procedure 60(b). The Rosebrook plaintiffs did not file their petition for fees until December 24, 1991, considerably more than ten days after the entry of final judgment on the fees issue. As a result, we construe their petition as a Rule 60(b) motion, or, more precisely, as an attempted Rule 60(b) motion.

The bases for relief specified in Rule 60(b) are indeed broad, encompassing "any . . . reason justifying relief from the operation of the judgment." We warned in *Deutsch*, however, that parties should not expect to use the principle announced there as "a Trojan horse for sneaking what are actually tardy Rule 59(e) motions into the courtroom under the guise of Rule 60(b)." 981 F.2d at 302. The Rosebrook plaintiffs' petition for fees can reasonably be considered as nothing other than a belated Rule 59(e) motion. The district court thus properly denied it as untimely in the first instance and did not abuse its discretion in refusing to reverse that decision upon the Rosebrook group's motion for reconsideration.

For the foregoing reasons, we REVERSE the judgment of the district court insofar as it held that the Scott group is not a prevailing party. We also REVERSE the district court's determination that special circumstances exist so as to preclude the award of attorneys' fees to prevailing parties. We AFFIRM the district court's judgment that the Hastert and Nieves plaintiffs are prevailing parties and that the Chicago Urban League plaintiffs are not prevailing parties. We also AFFIRM the court's denial of the Rosebrook group's petition for fees as untimely filed. Finally, we REMAND the case with instructions to award reasonable attorneys' fees to the prevailing parties.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH INSTRUCTIONS

COFFEY, *Circuit Judge*, dissenting. I concur with the majority opinion on the issue of which parties prevailed in the litigation, i.e., the Hastert plaintiffs, the Nieves plaintiffs and the Scott plaintiffs, however, I am of the opinion that the district court did not abuse its discretion in denying fees to the prevailing parties because of the presence of special circumstances. *See Hastert v. State Bd. of Elections*, 794 F. Supp. 254, 260-61 (N.D. Ill. 1992). It is well-settled that prevailing parties "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 1937 (1983) (quoting S. Rep. No. 94-1011, 2d Sess. 4, *in* 1976 U.S.C.C.A.N. 5908, 5912 (quoting *Neuman v. Piggie Park Enterprise*, 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968))). Congress clearly provided this exception for special circumstances because it was cognizant that an award of attorneys' fees is not always warranted. *See* S. Rep. No. 94-1011 at 1 *in* 1976 U.S.C.C.A.N. at 5909 (declaring the purpose of the Attorney's Fees Awards Act as "giv[ing] the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts . . ."); *see also Seattle School Dist. v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd* 458 U.S. 457, 102 S. Ct. 3187 (1982) (special circumstances render an award unjust when "allowing attorney's fees in a particular case would [not] further the congressional purpose in adopting the [fee] Acts" or when an award is contrary to "the balance of the equities").

I agree with the majority that both the indigent civil rights plaintiff and the civil rights plaintiff who has the financial means to afford legal representation are entitled to attorneys' fees, *see, e.g., Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990), and thus it would be inappropriate to deny attorneys' fees to the prevailing plaintiffs in this action merely because they may have some economic means. However, it is evident that the three-judge district court panel denied the attorneys' fees in part because of the "balance of the equities," *Seattle School Dist.*, 633 F.2d

at 1348, and not simply because the plaintiffs were not "drawn from the ranks of the disempowered and financially disadvantaged." *Hastert*, 794 F. Supp. at 260-61.

In regard to the balance of the equities, my primary concern is that if parties can obtain attorneys' fees under the particular set of facts in this case then we are inviting future plaintiffs to stonewall during the legislative redistricting process and once the deadline for the legislature to adopt a redistricting plan passes, the parties may shift the debate into the federal court arena where they will be entitled to attorneys' fees. The majority dismisses this concern by stating that the fee award is justified because of the legislature's "dereliction," i.e., the political branch of government failed to pass redistricting legislation before the statutory deadline. We are hardly in a position to make an assessment of this factual situation for we have before us neither a record of the legislative hearings nor any live witnesses much less a tape of the proceedings. Thus, while it is obvious that fee awards may issue against state governments, *e.g. Hutto v. Finney*, 437 U.S. 678, 694 (1978), it is far from obvious that such an award is mandated in the case before us.

The posture of this case dictates that we deny the prevailing parties attorneys' fees. If this case had remained in the legislative forum the parties would not be entitled to attorneys' fees. The only reason they now qualify for an award of attorneys' fees is because the legislature, possibly due to a lack of leadership or many and/or sundry other potential reasons, failed to draft a redistricting plan within the statutorily imposed deadline. Significantly, we have no knowledge of what role the prevailing parties played if any in preventing the legislature from adopting a redistricting plan prior to the deadline. The plaintiffs might have interfered with the legislative process through stonewalling the legislature from timely passing a redistricting plan. Thus, I am of the opinion that neither the purpose of the fee-shifting statute nor the balance of the equities favors a grant of attorneys' fees.

In addition, and perhaps most importantly, it is evident that throughout the redistricting process the State Board of Elections at all times made it eminently clear that it was willing to conduct the 1992 congressional elections according to whatever plan was adopted. The Board's unqualified acquiescence is proof that the State was not actively involved in denying the plaintiffs' voting rights and thus the State of Illinois through its Board of Elections should not be penalized and ordered to pay the plaintiffs' legal fees. This must not be read to indicate that prevailing parties are not entitled to attorneys' fees in any redistricting cases, but under this particular set of facts, where there was a complete lack of adversarial activity on the part of the State Board of Elections, I am convinced that attorneys' fees should be denied as a special circumstance.

Because the majority is intent on awarding attorneys' fees, I can only suggest to the district court that on remand they heed to the Third Circuit case of *Daggett v. Kimmelman*, 864 F.2d 1122 (3d Cir. 1989), which contains a thorough and thoughtful analysis on what constitutes reasonable attorneys' fees. *Daggett* prohibits plaintiffs from receiving attorneys' fees for "time spent on political considerations, even if interwoven with services that are compensable." *Id.* at 1128. Additionally, in *Daggett*, the court was unwilling to accept prevailing parties attorneys' affidavits as proof positive of reasonable fees. The court of appeals directed the trial court to make an inquiring search into the billable hours to assure that "the New Jersey taxpayers, would not be required to pay fees for anything other than the time reasonably spent to devise a constitutional plan." *Id.* at 1127. Because of the holding in the majority opinion, the district court will be required to conduct a fact finding hearing to determine what, if any, attorneys' fees are compensable. I would encourage the trial court to make an in-depth inquiry into the award of attorneys' fees to assure that they are not recompensed for time that was commingled with political considerations because fee shifting in civil rights litigation is not meant

to produce a "windfall" for attorneys. *Farrar v. Hobby*, 113 S. Ct. 566, 575 (1992).

For the reasons stated herein, I respectfully DISSENT.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 91 C 4028 (Consolidated)

Date: January 17, 1992

Name of Assigned Judge: KANNE/NORGLE/CONLON

Case Title: Dennis J. Hastert, et al. v.
State Board of Elections, et al.

MOTION: Plaintiffs' Motions to Amend or Alter Judgment

DOCKET ENTRY:

* * * * * *

(10) ☒ [Other docket entry]

Plaintiffs' Fed.R.Civ.P. 59(e) motions to amend or alter judgment to permit an award of attorney's fees is denied. The costs of notice of publication ordered by this court on July 31, 1991 shall be divided equally among the *Hastert*, *Nieves*, *Rosebrook* and *Collins* plaintiffs.
ENTER MEMORANDUM OPINION AND ORDER.

/s/ SUZANNE B. CONLON

(11) ☒ [For further detail see ☒ order attached to the original minute order form.]

* * * * * *

[Dated January 17, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Consolidated Cases

DENNIS J. HASTERT, HARRIS FAWELL, JOHN E. PORTER, PHILIP M. CRANE, HENRY J. HYDE, AND ROBERT H. MICHEL,

Plaintiffs,

No. 91 C 4028 v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, WANDA L. REDNOUR, AND HANNELORE HUISMAN,

Defendants.

WILFREDO NIEVES, AL JOHNSON, LINDA D. CORONADO, BOBBY RUSH, JESUS GARCIA, REV. WILLIE BARROW, RAFAEL BORIA, MIGUEL DEL VALLE, ROBERT L. LUCAS, LEON D. FINNEY, JR., REV. CLAY EVANS, JOSEPH GARDNER, LUIS V. GUTIERREZ, REGNER SUAREZ, JOSEPH BERRIOS, MIGUEL A. SANTIAGO, NEOMI HERNANDEZ,

Plaintiffs,

No. 91 C 4154 v.

ILLINOIS STATE BOARD OF ELECTION COMMISSIONERS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, AND WANDA J. REDNOUR,

Defendants.

CARDISS COLLINS, CHARLES HAYES, REV. WILBUR N. DANIELS, REV. CLAUDE S. WYATT, HOWARD B. BROOKINS, DONALD L. WILLIAMS, PERCY GILES, AND RICKY HENDON,

Plaintiffs,

No. 91 C 4643 v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, JOHN P. DAILEY, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, AND WANDA REDNOUR,

Defendants.

ANN ROSEBROOK, DARYL BARKLOW, AMIEL CUETO, RICHARD MARK, JEANELLE NORMAN, CAROLYN TONEY, LEE BABCOCK, RAYMOND OLIVER, BARBARA POSHARD, WILLIAM MATHEWS, GERALD HAWKINS, AND EVA SAVALA,

Plaintiffs,

No. 91 C 4656 v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, WANDA L. REDNOUR, AND HANNELORE HUISMAN,

Defendants.

THE CHICAGO URBAN LEAGUE, CRAIG R. COLLINS, MARK ALLEN, AND NIKOLAS C. THEODORE,

Plaintiffs,

No. 91 C 5472 v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, JOHN P. DAILEY, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, AND WANDA L. REDNOUR,

Defendants.

MEMORANDUM OPINION AND ORDER

Before KANNE, Circuit Judge, NORGLE, District Judge, and CONLON, District Judge.

Per Curiam. Various plaintiffs and intervenors in this consolidated action regarding the remapping of Illinois congressional districts following the 1990 census now move pursuant to Fed. R. Civ. P. 59(e) to modify judgment to permit the awarding of attorneys' fees and costs under 42 U.S.C. §§ 1973*l*(e) and 1988.

BACKGROUND

On November 7, 1991, final judgment was entered in these consolidated cases. *Hastert v. State Board of Elections*, No. 91 C 4028, slip op. (November 7, 1991). Judgment was entered in favor of the *Hastert*, *Nieves*, *Collins*, *Rosebrook*, and *Chicago Urban League* plaintiffs to the extent those parties requested that the then-existing Illinois congressional district plan be declared null and void. *Id.* slip op. at 64. Although each of the parties named the Illinois State Board of Elections and its members as the sole defendants in the separately filed actions, the Board did not possess the authority to provide plaintiffs with the relief they sought. Additionally, the Board did not dispute plaintiffs' contentions that population changes represented in the 1990 census rendered unconstitutional the existing congressional district plan implemented by federal court order following the 1980 census. *See In re Congressional Dist. Reapportionment Cases*, No. 81 C 3915, slip op. (N.D. Ill. Nov. 23, 1981). However, because the Board of Elections remained bound to implement the terms of the federal court order that had created the outmoded congressional district plan, the Board remained a necessary party to

the present actions. The Board thus served only as a nominal party and played no active role in the proceedings.

The adversarial circumstances requiring trial before this three-judge district court panel arose solely from competing redistricting plans submitted by the plaintiffs themselves. Thus, this court served as the arena for the principally legislative task of redrawing Illinois' congressional districts. Only two statewide redistricting plans, the so-called *Hastert* and *Rosebrook* plans, were placed in evidence before the court during the two-day trial held in early October 1991. The court ultimately ordered the adoption of the *Hastert* plan to govern Illinois congressional elections until Illinois congressional districts are otherwise reapportioned in accordance with law. *Hastert*, slip op. at 65. The court also directed that "all parties to these consolidated cases shall bear their own costs." November 6, 1991 Memorandum Opinion and Order at 66.

On November 20, 1991, the *Hastert*, *Nieves* and *Chicago Urban League* plaintiffs and Scott intervenors moved pursuant to Fed. R. Civ. P. 59(e) to modify the judgment and requested that the court award them fees and costs as prevailing parties under 42 U.S.C. §§ 1973*l*(e) and 1988. The *Collins* plaintiffs filed a similar motion on November 21, 1991. On November 27, 1991, the *Harold Washington Party/Savage* intervenors separately moved to become additonal parties to the *Hastert* motion to modify judgment.

DISCUSSION

Various plaintiffs and intervenors move pursuant to Fed. R. Civ. P. 59(e) to amend the November 7, 1991 judgment of the court to permit the award of attorney's fees

under 42 U.S.C. §§ 1973*l*(e) and 1988. Ordinarily, a request for fees is a collateral issue to the main cause of action. *See White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451 (1982). However, this court's express order directing the parties to bear their own costs means that plaintiffs' requests for fees necessarily constitute a Rule 59(e) motion to alter or amend judgment. To be valid, a Rule 59(e) motion must be served "not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). The *Harold Washington Party/Savage* intervenors moved to join the present Rule 59(e) motions on the thirteenth working day, exclusive of weekends and holidays, after entry of judgment. Accordingly, the motion of the *Harold Washington Party/Savage* plaintiffs is denied as untimely. The court does have jurisdiction over the timely-filed Rule 59(e) motions of the remaining moving plaintiffs.

Under 42 U.S.C. § 1973*l*(e), a court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of costs" in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 42 U.S.C. § 1973*l*(e). Under 42 U.S.C. § 1988, which was patterned in part upon the fee provision contained in § 1973*l*(e), *see Hanrahan v. Hampton*, 446 U.S. 754, 758, n.4 (1980), a court may permit a similar award to a "prevailing party" in a suit to enforce the provisions of 42 U.S.C. § 1983. 42 U.S.C. § 1988. In enacting both of these statutes, Congress directed that prevailing parties "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." S. Rep. 925, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 807 (citation omitted) (addressing § 1973*l*(e)) ("S. Rep. 925"); S. Rep. 1011, 94th Cong., 2d Sess. 4 (1976), *re-*

printed in 1976 U.S. Code Cong. & Admin. News 5908, 5912 (citation omitted) addressing § 1988) ("S. Rep. 1101"). *See also Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citation omitted).[1]

The first question to be answered in considering plaintiffs' motions is whether the various movants are prevailing parties within the meaning of the fee statutes. " '[P]laintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Hensley*, 461 U.S. at 433, quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). All of the movants contend that they prevailed on what they characterize as the significant issue of the unconstitutionality of the 1981 congressional districting plan due to population changes reflected in the 1990 census.

The moving plaintiffs are correct only in the technical sense that this court declared the previous congressional districts null and void. However, the issue of the constitutionality of the previous congressional districts was never in dispute. Indeed, after filing their respective complaints, none of the plaintiffs offered more than a passing reference to this subject; the unconstitutionality of the 1981 plan was dispensed with in a perfunctory footnote in the court's memorandum opinion. *See Hastert*, slip op. at 14 n.7. Fee claims cannot be reasonably justified on this basis. Thus, we turn to the various alternative arguments offered by the respective plaintiffs.

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[1] Because §§ 1973*l*(e) and 1988 contain nearly identical language and are driven by similar congressional purposes, courts construe the two statutes similarly. *See e.g., Kirksey v. Danks*, 608 F. Supp. 1448, 1452 (S.D. Miss. 1985); *cf. Hensley v. Eckerhart*, 461 U.S. at 433 n.7.

The principal issue in litigation during these proceedings involved the determination of which proposed plan for the entire State of Illinois best met constitutional and statutory criteria. All parties agreed that the new congressional district map should contain four minority districts—one Hispanic and three African-American super-majority districts. However, no prior Illinois congressional district map had contained an Hispanic super-majority congressional district. The creation of a super-majority district for the Hispanic "language minority" community residing in the Chicago area therefore required special consideration despite the agreement among the parties. Thus, the determination of an Hispanic super-majority district is also properly viewed as a significant issue in litigation.

The *Collins* plaintiffs assert prevailing party status in part because the configuration of the First and Seventh Congressional Districts contained in the *Hastert* plan adopted by the court closely approximated the configuration of those same districts advanced by the *Collins* plaintiffs. This assertion entirely disregards the fact that the *Collins* plaintiffs ultimately adopted the *losing* plan advanced by the *Rosebrook* plaintiffs. Moreover, the *Collins* plaintiffs devoted their efforts at trial exclusively to the issue of the placement of the small geographical area comprising Chicago's Second Ward. Not only were the *Collins* plaintiffs' arguments on this issue ultimately rejected, but they also were found to be tangential to the proper scope of the court's inquiry. *Hastert*, slip op. at 64. The *Collins* plaintiffs therefore do not constitute a "prevailing party" for the purposes of §§ 1973*l*(e) and 1988.

The *Scott* intervenors introduced themselves to these proceedings on September 30, 1991, just over a week be-

fore trial, for the limited purpose of addressing the configuration of a relatively small geographic area in the vicinity of East St. Louis, Illinois, contained in one of the pre-trial *Hastert* plans. The *Scott* intervenors had barely finished introducing themselves to these proceedings when they stated at the October 3, 1991 pre-trial conference that they had reached an accommodation with the *Hastert* plaintiffs. The *Scott* intervenors further stated that they would neither participate in these subsequent proceedings nor would they formally endorse or object to the plans to be offered in evidence at trial. Placed in the context of arduous and complicated expedited proceedings conducted to review only redistricting plans for the entire state, the *Scott* intervenors' fleeting presence to address their concerns regarding a tiny fraction of the state, their neutral stance regarding the merits of the principal issue to be litigated and their absence from the trial proceedings compel the conclusion that they do not constitute a statutory "prevailing party" with respect to a "significant issue in litigation." *Hensley*, 461 U.S. at 433.

The *Chicago Urban League* plaintiffs, like the *Collins* plaintiffs and *Scott* intervenors, focused their attention on a small portion of the state. In addition to seeking the perfunctory declaration voiding and nullifying the 1981 congressional districts, the *Chicago Urban League* plaintiffs sought implementation of their own proposed plan for the four minority districts. The *Chicago Urban League* plan closely tracked the *Hastert* configuration of the minority districts. However, similarities to the final *Hastert* plan notwithstanding, the *Chicago Urban League* plaintiffs chose to proceed on the basis of their own separate map. Moreover, the *Chicago Urban League* did not address the merits of their proposal within the larger context of the adoption of a new state-wide plan, the prin-

cipal issue before the court. Thus, although the court characterized the *Chicago Urban League* map as effectively adopting the *Hastert* configuration of certain African-American super-majority districts, *see Hastert*, slip op. at 62, the court did not adopt the separate *Chicago Urban League* plan. Therefore, the *Chicago Urban League* plaintiffs are not a "prevailing party" on any significant issue.

The remaining movants, the *Hastert* and *Nieves* plaintiffs, are "prevailing parties" for purposes of § 1973*l*(e) and 1988. This court ultimately adopted the congressional district plan submitted by the *Hastert* plaintiffs. The *Nieves* plaintiffs formally adopted the *Hastert* plan and clearly played a critical role in its development. Indeed, the pre-trial activities of both the *Hastert* and *Rosebrook* plaintiffs involved attempts to satisfy the *Nieves* plaintiffs' goal of establishing Illinois' first Hispanic super-majority district. Additionally, the *Nieves* plaintiffs provided the only truly substantive evidence and legal analysis regarding the establishment of an Hispanic super-majority district. Thus, the adoption of the *Hastert* plan rendered both the *Hastert* and *Nieves* plaintiffs prevailing parties on the significant issues in litigation.

As noted above, prevailing parties should ordinarily recover fees except where "special circumstances" would render a fee award "unjust." *Hensley*, 461 U.S. at 429. Two factors have been considered in determining "if a case involves 'special circumstances' that would make an award 'unjust': (1) whether allowing attorney's fees in a particular case would further the congressional purpose in adopting the [fee] Acts, and (2) the balance of the equities." *Seattle School Dist. v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980) (citations omitted), *aff'd*, 458 U.S. 457 (1982).

The principal congressional purpose behind the enactment of the attorneys' fees provision of §§ 1973*l*(e) and 1988 is reflected in Congress' observation that "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." S. Rep. 1011 at 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910; *see also* S. Rep. 925 at 43 & n.47, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 809-10. As a result, fee awards are often "an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies" embodied in civil rights legislation. *Id.*; *see also* S. Rep. 925 at 41, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 808. Congress' primary purpose in providing attorney's fees in civil rights litigation, therefore, was "to eliminate financial barriers to the vindication of constitutional rights" and thereby "stimulate voluntary compliance with the law." *Seattle School Dist.*, 633 F.2d at 1348 (citation omitted). Awarding fees to the *Hastert* and *Nieves* plaintiffs would not advance this congressional purpose.

The *Hastert* plaintiffs collectively comprise the entire Republican Party contingent of the current Illinois congressional delegation. The *Nieves* plaintiffs include in their ranks two Chicago aldermen, an Illinois state senator and other community leaders. Plaintiffs therefore do not appear to be drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting §§ 1973*l*(e) and 1988. The same observation applies to various other plaintiffs in these consolidated proceedings. For instance, the principal *Collins* plaintiffs are two Democratic Party members of the Illinois congressional delegation. Additionally, it appeared that the *Rosebrook* plaintiffs acted as nominal plaintiffs

on behalf of the Democratic Party and various other Democratic members of the current Illinois congressional delegation.

The identity of the plaintiffs in this consolidated action, particularly the principal plaintiffs, suggests that plaintiffs merely shifted the legislative lobbying process that typically attends congressional redistricting to a federal judicial arena. To the extent this move was necessary, blame must be traced in part to the unwillingness of many of the parties to this action, in addition to their state legislative counterparts, to grapple with the issue of congressional redistricting in its intended arena, the state legislature. The present action did not involve a review of the constitutionality of a state-endorsed plan. Instead, the real issues in dispute involved arguments over how Illinois' congressional district lines should be drawn. That issue often involved parochial interests and partisan political concerns that are typically legislative matters.

Plaintiffs would have had to bear their own costs had they fully pursued the redistricting process in the state legislature. It would be inequitable to shift the burden of bearing the costs for plaintiffs' lobbying efforts to the State of Illinois *and thus the taxpayers* merely because the parties moved the pursuit of their political interests to a federal court under the civil rights laws. Accordingly, the balance of equities presents special circumstances warranting a denial of a fee award.

These observations are not meant to detract from the admirable efforts undertaken by the various plaintiffs once the issue of congressional redistricting was moved to this forum. We merely point out the consequences of the Illinois legislature's failure to formulate congressional redistricting plans over the years. *See Hastert*, slip op. at 13 & n.6. The admirable work of the parties in the present

action more appropriately should have been carried out in the halls of the state legislature. The prevailing parties should not now receive a fee award for expenses that they would not have been able to recoup had they resolved their differences in the legislative forum.

One final administrative matter requires our attention. On July 31, 1991, the court ordered the immediate publication of notice of these proceedings in daily newspapers around the State of Illinois. The published notice invited participation by any interested group or individual. At the time the court issued its order, the *Hastert* and *Nieves* actions had been filed and consolidated. The *Rosebrook* and *Collins* plaintiffs had filed their separate related actions, with consolidation following soon after. To achieve immediate compliance with the court's notice order, the *Hastert* plaintiffs undertook the administrative and financial burden of publishing the required notice. The *Hastert* plaintiffs now seek partial reimbursement for the costs of the necessary courtesy it extended to the other plaintiffs. The costs of the required notice should be divided equally among the *Hastert, Nieves, Rosebrook* and *Collins* parties. Publication of notice was ordered to advance the disposition of the claims of these plaintiffs who had filed the only claims at the time notice of publication was ordered.

CONCLUSION

Plaintiffs' Fed. R. Civ. P. 59(e) motions to amend or alter judgment to permit an award of attorney's fees is denied. The costs of notice of publication ordered by this court on July 31, 1991 shall be divided equally among the *Hastert, Nieves, Rosebrook* and *Collins* plaintiffs.

January 17, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 91 C 4028 Date: January 21, 1992

Name of Assigned Judge: SUZANNE B. CONLON

Case Title: HASTERT et al -v- STATE BOARD OF ELECTIONS et al

* * * * * *

DOCKET ENTRY:

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(10) ☒ [Other docket entry] The Rosebrook plaintiffs' motion to reconsider is denied as moot. *See* memorandum opinion and order dated January 17, 1992.

/s/ SUZANNE B. CONLON

* * * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 91 C 4028 Date: January 7, 1992

Name of Assigned Judge: Judge Suzanne Conlon

Case Title: Dennis J. Hastert v. State Board of Elections, et al.

MOTION: Plaintiff, Rosebrook's Motion for Leave to File Their Petition for Attorney's Fees and Expenses and Supporting Brief Pursuant to Local Rule 46

DOCKET ENTRY:

* * * * * *

(2) ☒ [Other docket entry:]

Motion is denied as untimely.

/s/ SUZANNE B. CONLON

* * * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 91 C 4028 Date: December 27, 1991

Name of Assigned Judge: Suzanne B. Conlon

Case Title: Dennis J. Hastert, et al. v.
State Board of Elections

MOTION: Rosebrook Plaintiffs' Motion to Alter or Amend Judgment

DOCKET ENTRY:

* * * * * *

(10) ☒ [Other docket entry]

The *Rosebrook* plaintiffs' motion to alter or amend judgment is denied as moot. *See Hastert, et al. v. State Board of Elections*, 91 C 4028, Memorandum Opinion and Order of November 6, 1991 at 37 ("The difference between the two plans is minimal" with respect to the proposed Hispanic districts).

/s/ SUZANNE B. CONLON

* * * * * *